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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 919

IRVING W. POWLESS,

Petitioner,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

IRVING W. POWLESS,

Petitioner,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case on the 21st day of October, 1965.

Opinions Below

The determination of the State Tax Commission is appended to this Petition in the Appendix at page 1a. The Opinion of the Appellate Division, Third Department is reported at (22 A.D. 2d 746). The Court of Appeals affirmed without opinion the order of the Appellate Division.

Jurisdiction

The judgment of the New York Court of Appeals was made and entered on October 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

The questions presented are:

1. Is a tribal Indian, member of the Onondaga Indian Nation and the Six Nations Indian (Iroquois) Confederacy living on the Onondaga Reservation in the State of New York a resident of New York State for purposes of the personal income tax imposed by the State?

2. If a resident of New York State, is he subject to New York State personal income tax on his entire net income?

The New York State Tax Commission answered both questions in the affirmative. This was confirmed by the Appellate Division, Third Department and affirmed by the Court of Appeals of the State of New York.

Treaties and Constitutional and Statutory Provisions Involved

Sections 1 (2) and 1 (8) of the United States Constitution

Section 2 of the 14th Amendment to the United States Constitution 25 U.S.C. #177, 232, 233

U. S. Treaties with the Six Nations Indian Confederacy and the Onondaga Nation dated October 22, 1784, January 9, 1789 and November 11, 1794, *7 Stat. 15, 33, 44.*

Tax Law of the State of New York, Article 16.

Statement

The facts herein are not in dispute; they were stipulated as follows:

"1. The taxpayer, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959 he resided on the Onondaga Reservation at R.D. #1, Nedrow, New York, together with his wife, Cecilia, and his son, Everett. In the years prior to 1959 the taxpayer also resided on the Onondaga Reservation.

2. During the calendar year 1959 the taxpayer was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York, and earned the sum of $5,365.78. During that year, the Chrysler Corporation withheld from the taxpayer's wages New York State personal income tax in the amount of $126.37.

3. During the month of May, 1961, the taxpayer filed with the State Tax Commission a New York State resident income tax return on short form IT-200, under protest, and with said return, filed a claim for refund on the entire amount of $126.37 which had been withheld from his wages as aforesaid. The ground for such claim, as stated therein, was that the taxpayer is not subject to New York State personal income taxation and that Section 351 of the New York State Income Tax Law is invalid and unconstitutional insofar as it attempts to place a tax upon income earned by a member of an Indian nation residing on a reservation in the State of New York.

4. By letter dated May 22, 1961, the State Tax Commission allowed a refund in the amount of $32.87, but denied a refund of the balance claimed, amounting to

$93.50, on the ground that the compensation paid to the taxpayer was income taxable under the New York State Personal Income Tax Law. Thereafter, and on or about August 2, 1961, the taxpayer, through his attorneys, Wiggin, Tsapis, Golder and Freeman, filed with the State Tax Commission, a demand for hearing in the form prescribed by said Commission."

At the Hearing in the State Tax Commission on June 5, 1962, the parties stated that they agree to have this case as a test case for other Indian cases. The State Tax Commission determined on October 3, 1963 that Petitioner was a resident of the State of New York and that he was subject to State Income Tax on his entire net income.

A proceeding for a review of this determination was instituted in the Supreme Court of the State of New York which by order dated January 24, 1964 transferred the proceeding to the Appellate Division, Third Department in accordance with the provision of #7804(g) of the Civil Practice Law and Rules. On October 28, 1964, the Appellate Division confirmed the determination of the State Tax Commission. This order of the Appellate Division was affirmed without opinion on October 21, 1965 by the Court of Appeals

Reasons for Granting the Writ

Petitioner had to forego the right to have his case reviewed by appeal pursuant to 28 U.S.C. 1257(2) in order to assume full scope in the Supreme Court to review also his rights, privilege or immunity under the U. S. Constitution and treaties, and the validity of U. S. Treaties with his Indian Nation. The challenge to the Tax Law

of the State of New York is limited to the State's attempt to apply it to Reservation Indians of the Six Nations.

The decision below should be reviewed because without opinion it erroneously affirmed the decision of the Appellate Division, Third Department which relied on State Tax Commission *v.* Barnes, 14 Misc. 2d 311 as its sole authority. The decision of the Appellate Division sought to avoid the difficult constitutional questions arising from the peculiar status of Petitioner who is an incompetent Indian in tribal relations, living on a Reservation and is a member of the Onondaga Indian Nation and the Six Nations Indian (Iroquois) Confederacy. The case cited by the Appellate Division relied erroneously on these class of cases which should have been distinguished from the case at bar:

(A) Cases involving emancipated (competent) Indians.

Choteau v. *Burnet*, 283 U. S. 691 involved an emancipated Indian under the 1906 Allotment Act. This Act granted exemption from taxation to the Indian for twenty five years, and the Indian upon receipt of a Certificate of Competency, under c.3572 (34 Stat. 539) possessed the right to manage, control and dispose of his or her lands the same as any citizen of the United States. He becomes a person subject to taxation, having in fact and in law severed his tribal relations. At page 695, this Court specifically stated that it was not concerned with members who do not have Certificates of Competence. This case simply held that *a competent* Indian, who had unrestricted control over lands and income therefrom, was not exempt from income tax solely because of his status as Indian. The case began as three companion cases in 38 F. 2d

976 (10 Cir.), 1930, *Blackbird, Pettit* and *Choteau.* In the *Blackbird* case, the Court held that a restricted full-blood Osage Indian was not liable for income tax. In the *Pettit* case the Court held that a white woman inheriting from children, members of the Osage tribe, lands allotted to them under statute was liable for income tax on royalties and bonuses on mineral deposits. Both *Blackbird* and *Pettit* cases were not appealed or disturbed. The *Choteau* case held that a member of Osage tribe receiving certificate of competency was liable for income tax. The three cases were argued and submitted together but were different in their facts. This is clearly stated in *Big Eagle* v. *U. S.,* 300 F. 2d 765 (1962), (Footnote 2, page 766). And at page 768 the Court in interpreting *Choteau* v. *Burnet,* stated

> The Supreme Court said that (Revenue Act) does not expressly exempt the sort of person having petitioner's status which was that of a competent Indian, who, since receipt of his certificate of competence, had been taxable * * * The decision is clearly bottomed upon the fact that this Indian had achieved emancipation. *Blackbird* was neither overruled nor modified by *Choteau.*

The same conclusion was reached by *Squire* v. *Capoeman,* 531 U. S. 1 (1956), (Footnote 19, page 9) and *Nash* v. *Wiseman,* 227 F. S. 552, 554 (1963).

(B) Cases involving Allotment Statutes.

To encourage the Indian to sever his tribal relations, various treaties and special Acts of Congress have provided for allotment of lands to individual Indians, which lands were ultimately to become their personal property. These Indians were required to sever their tribal relations,

live on their allotments and adopt the life and habits of the "civilized white man". E.g. Treaty of September 27, 1830 with Choctaw Indian Nation, 7 Stat. 333, and the Dawes Act of February 8, 1887, 24 Stat. 388, as amended in 1901, 31 Stat. 1447. The Dawes Act provided for allotment of lands in severalty to Indians and conferred citizenship on the allottees. Congress definitely made such citizen Indians allottees subject to the laws and governmental authority of the states in which they live, and extended to them all the privileges and immunities of citizens in their respective states. The allotment cases are regulated by the specific allotment statutes as interpreted by the Courts. In these cases, the allotment acts provide for exemption from taxation for certain periods, division of tribal lands, allotment, certificates of competency and complete emancipation of the Indian who ceases to be an Indian in the eyes of the law upon compliance with the requirement of the Act.

(C) Cases involving Federal Income Tax.

In the leading case of *Choteau* v. *Burnet, supra,* which involved Federal Income Tax, the Court said at page 696, citing *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922) and *Shaw* v. *Oil Corp,* 276 U. S. 575 (1928), that even though the income received was subject to Federal Income Tax, it was beyond the taxing power of the State to tax it. *U. S.* v. *Rickert,* 188 U. S. 432 (1903), is not overruled or departed from. In this case it was held that property held in trust by the United States for Indian allottees were not subject to State taxes without the consent of Congress. *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598 (1943) cites but does not overrule *U. S.* v. *Rickert, supra. Oklahoma Tax Commission* v. *United*

States, supra, involved an interpretation of an Oklahoma Statute which subjected to taxation "all transfers of estates". This case should be examined with the discussion in *United States* v. *Oklahoma Tax Commssion,* 131 F. 2d 635 (1942) and *Childs* v. *Beaver,* 270 U. S. 555 (1926).

(D) Cases involving non-Indians and other citizens.

The *Mountain Producers* case, 303 U. S. 376 (1938), involved a tax upon the income of an oil and gas lessee of state lands, and it stands for the rule that the interest of the lessee is too remote to be protected from the levy under the rule exempting state instrumentalities from federal taxation. In this and other cases, the Indian was not involved but it was the white lessee who wanted to extend the exemption to him.

(E) Cases involving Oklahoma Indians.

This Court in *Oklahoma Tax Commissioner* v. *U. S. supra,* has specifically stated that Oklahoma Indians are anomalous. A case involving Oklahoma Indians does not necessarily apply to New York Indians. This Court stated in *Oklahoma Tax Commission* v. *U. S. supra,* at page 603 that Oklahoma Indians "Although they are remnants of the form of tribal sovereignty, these Indians have no effective tribal authority as in *Worcester* v. *Georgia, supra,* and unlike the Indians involved in the *Kansas Indians, supra,* they are actually citizens of the State with little to distinguish them from all other citizens except for their limited restrictions and their tax exemptions." In contrast, the status of the New York Indians has been settled in the case of *New York Indians,* 5 Wall. 761. Furthermore, there is significant difference between

the activities and power of the Oklahoma Indians in the State of Oklahoma as compared with New York Inndians. This is described in *Board of County Commissioners* v. *Seber,* 130 F. 2d 633, 682.

These additional points were ignored by the Courts below:

A) Indians have always been the object of special legislation.

The case of *Cherokee Tobacco,* 11 Wall. 616, 20 L. Ed. 227, is nullified as a precedent by *U. S.* v. *Forty Three Gallons of Whiskey,* 108 U. S. 491, 494 (1882). Not only general statutes do not apply to Indians unless they specifically so provide, amendments to the U. S. Constitution were held not applicable to Indians. *U. S.* v. *2,005.32 Acres,* 160 F. S. 193 (1958), *Elk* v. *Wilkings,* 112 U. S. 94, *U. S.* v. *Rickert,* 188 U. S. 432, *Lewelleon* v. *Colonial Trust Co.,* (3rd Cir.) 17 F. 2d 36 (1927), *McCandless* v. *U. S.,* (3rd Cir.) 25 F. 2d 71 (1928), *Ex Parte Dog Crow,* 109 U. S. 556 (1883). *Talton* v. *Mayes,* 163 U. S. 376 (1895), *Toledo* v. *Pueblo De Jemez,* 119 F. S. 429 (1954), *Native American Church* v. *Navajo Tribal Counsel* (10th Cir.), 272 F. 2d 131 (1959), *Glover* v. *U. S.* 219 F. S. 19 , DC Montana (1963).

(B) State Laws do not apply to Tribal Indians without specific authorization by Congress.

This point is accepted in the Opinion of New York Attorney General, 1915, Vol. II, which was cited with approval in *U. S.* v. *Hamilton,* 233 F. 685 (1915).

In the Senate Report No. 1137, 80th Congress, 2nd Session, 1948, it was stated that "state law does not apply to Indians except so far as the United States has given its consent." This is in line with decisions in *U. S.* v. *Forness,* 2nd Cir. 125 F. 2d 928 (1942), *cert. denied* 326 U. S. 496 and *Lee* v. *Ganoda Trading,* 358 U. S. 217 (1958).

(C) Indians residing on reservation are not resident of New York State.

This Court in *Kennedy* v. *Becker,* 241 U. S. 556 (1915) made a distinction at page 560 between Indian Reservation on which the Senecas reside and New York State territories. Indians are ruled in the Opinion of the New York State Attorney General in 1928 at page 206 not to be counted in apportioning congressman to the State (U. S. Constitution Art. 1 #3: Amend XIV #2) and in the Opinion of the U. S. Attorney General, 1940 "Exclusion of Indians not Taxed When Apportioning Representatives." In *Allen* v. *Merrell,* the Supreme Court of Utah, 305 P. 2d 490 (1956) held that an Indian living on a reservation is not deemed a resident of Utah. The conferring of U. S. citizenship on Indians did not change their constitutional relationship with the Federal Government. *U. S.* v. *Nice,* 241 U. S. 591 (1915), *U. S.* v. *Dewey County,* 14 F. 2d 784 (1926), affirmed 26 F. 2d 434 (1928); *U. S.* v. *Holliday,* 3 Wall, 407, 419, *U. S.* v. *Gardner,* 189 F. 690 (1911), *U. S.* v. *Sandoval,* 231 U. S. 28 (1913), 48 *U. S.* v. *Boble,* 237 U. S. 74, 79 (1915), *Winton* v. *Amos,* 255 U. S. 373 (1921) and *U. S.* v. *Logan,* 105 F. 240, 241.

(D) Lack of Federal Authority to support the State's Power to impose the tax.

New York State cannot use the Civil and Criminal Jurisdiction Statutes as a vehicle to impose State taxation on the Indian Reservations. New York Civil and Criminal jurisdiction were extended to Indians by express Acts of Congress, 25 U.S.C. #232, 233. No Congressional Act has authorized the State of New York to tax Six Nations Indians. *U. S.* v. *Quiver,* 241 U. S. 602, at page 606, held

that there must be some clear provision to justify the application of State laws to Indians. Also *Iron Crow* v. *Oglala,* 231 F. 2d 8th Cir. 89, 94 (1956), *U. S.* v. *U. S. Fidelity and Guaranty Co.,* 309 U. S. 506 (1939). Re Carmen's Petition, 165 F. S. 942, 948 (1958), *U. S.* v. *Dewey County,* 14 F. 2d 784, 788 (1926) certiorari denied, 278 U. S. 649.

(E) New York State lacks power to tax Six Nations tribal Indians.

1) The treaties between the United States and Six Nations and the Onondaga Nation inhibit the State from taxing these tribes, and define the Reservations as the property of these tribes and not as part of New York State. 7 Stat. 15, 33, 44, *Bryan County* v. *U. S.,* 123 F. 2d 782 (1941).

2) The power of taxation still exists in tribal governments, and the power to levy taxes is an inherent attribute of tribal sovereignty. *Iron Crow* v. *Oglala, supra, Barnes* v. *United States, D. C. Montana,* 1962, 205 F. S. 97, *Morris* v. *Hichcock,* 184 U. S. 384 (1904), *Buster* v. *Wright,* 135 F. 947, 8 Cir. (1905), app. dismissed, 203 U. S. 99 (1906) and *Childes* v. *Beaver,* 270 U. S. 555.

3) New York tribal Indians are still wards of the Federal Government. This is determined in the case of *Boylan* v. *U. S.* 256 F. 468, 265 F. 165, app. dism. 257 U. S. 614. *U. S.* v. *Kagama,* 118 U. S. 375 (1886), *Fellows* v. *Blacksmith* 19 How. 366 and *Seneca Nation of Indians* v. *Appleby,* 196 N. Y. 318.

The questions presented by this case are of great and recurring significance in the lives of these tribal Indians. At no fault of their own, their legal status and their

rights, privileges and immunities in the State of New York became a source of many contradictions and ambiguities on the state and federal levels. The State of New York has adopted an attitude laid down by its Attorney General and urged upon the two lower Courts by respondent that "New York Indians have been legally assimilated into the polity which is the 'People of the State of New York' on these grounds:

1) Their treaty-making power has been abolished

2) They have been made citizens

3) They have been made subject to the criminal and civil jurisdiction of the State of New York"

The important nature of these issues has already beeen recognized by this Court as recently as *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685 (1965). The serious effect of the decision below, if unreversed, upon the historic rights of these Indians under the United States Constitution, United States treaties and Statutes is unparalleled in the history of this Nation, and will have far reaching consequences.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition of Certiorari should be granted.

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New York, New York 10038

APPENDIX

I

DETERMINATION OF STATE TAX COMMISSION

In the Matter of the Application
of
IRVING W. POWLESS
For a Refund of Personal Income Taxes Under
Article 16 of the Tax Law of the Year 1959

A personal income tax return pursuant to Article 16 of the Tax Law having been filed by the taxpayer herein for the calendar year 1959; an application for refund of the income tax paid for that year having been filed on the ground that the taxpayer is not subject to New York State personal income taxation and that section 351 of the Tax Law is invalid and unconstitutional insofar as it attempts to place a tax upon income earned by a member of an Indian nation residing on a reservation in the State of New York; said application having been denied and a timely demand for hearing having been filed; a hearing pursuant to section 374 of the Tax Law having been held at the office of the State Tax Commission at the Gov. Alfred A. Smith State Office Building, Albany, New York, on June 5, 1962 before Arvis A. Johnson, Hearing Officer; an appearance on behalf of the taxpayer at said hearing having been made by Walter J. Wiggins, Esq., and Norman D. Freeman, Esq., of Wiggins, Tsapis, Golder & Freeman, Esqs.; a stipulation of facts, dated May 3, 1962, by and between the State Tax Commission and the above named taxpayer, by their duly authorized

attorneys, having been introduced in evidence at the hearing; the matter having been considered by the State Tax Commission;

The State Tax Commission hereby finds, in accordance with the stipulation of facts, dated May 3, 1962, referred to above:

1. The taxpayer, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959, he resided on the Onondaga Reservation at R.D. #1, Nedrow, New York, together with his wife, Cecilia, and his son, Everett. In the years prior to 1959, the taxpayer also resided on the Onondaga Reservation.

2. During the calendar year 1959, the taxpayer was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York, and earned the sum of $5,365.78. During that year, the Chrysler Corporation withheld from those wages New York State personal income tax in the amount of $126.37.

3. In May 1961, the taxpayer filed with the State Tax Commission a New York State resident income tax return on Short Form IT-200, under protest, showing a total income of $5,365.78, the amount received in 1959 from the Chrysler Corporation as compensation. With said return, the taxpayer filed a claim for refund of the entire amount of $126.37 which had been withheld from his wages as aforesaid.

4. By letter dated May 22, 1961, a refund in the amount of $32.87 was allowed by the State Tax Commission, but a refund of the balance claimed amounting to $93.50 was denied on the ground that the compensation paid to the taxpayer by his employer was income taxable under the New York State Personal Income Tax Law.

Upon the foregoing, the State Tax Commission

DETERMINES:

1. Pursuant to section 350, subdivision 7 of the Tax Law, the taxpayer was a resident of the State of New York for the year 1959 for purposes of the personal income tax imposed by Article 16 of the Tax Law because, in 1959, he was domiciled in the State of New York and maintained a permanent place of abode within New York.

2. Pursuant to section 351 of the Tax Law, as a resident of New York State the taxpayer was subject to tax upon his entire net income.

3. The application for refund with respect to the taxes of $126.37 withheld was properly granted to the extent of $32.87, the sum refunded being that amount of tax withheld by the Chrysler Corporation which was in excess of the tax due as shown by the taxpayer's 1959 return.

4. The application for refund with respect to the balance amounting to $93.50 was properly denied because the taxpayer was subject to tax under Article 16 of the Tax Law and $93.50 was the tax properly due.

5. No payment of personal income taxes has been illegally made or exacted for the year 1959.

Dated: Albany, N. Y., October 3, 1963

THE STATE TAX COMMISSION

JOSEPH H. MURPHY,
Commissioner

IRA J. PALESTIN,
Commissioner

JAMES R. MACDUFF,
Commissioner

II

ORDER OF THE APPELLATE DIVISION

NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

Present: Hon. James Gibson, Presiding Justice,
Hon. J. Clarence Herlihy,
Hon. Donald S. Taylor,
Hon. Felix J. Aulisi,
Hon. Herbert D. Hamm,
Associate Justices

In the Matter of the Application

of

IRVING W. POWLESS,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

Pursuant to Article 78 of CPLR and Sections 199 and 200 of the Tax Law.

This proceeding for a review pursuant to the provisions of Article 78 of the CPLR of the final determination of the respondent dated October 3, 1963, entitled "In the Matter of the Application of Irving W. Powless, for a Refund of Personal Income Taxes under Article 16 of the Tax Law for the year 1959," having been transferred to a term of this Court for disposition pursuant

to CPLR #7804(g) by an order of the Supreme Court, Albany County Special Term, dated January 24, 1964, and having duly regularly come on to be heard before this Court on the petition of Irving W. Powless, dated December 23, 1963, and the respondent's answer and return thereto verified January 27, 1964, and Omar Z. Ghobashy, Esq., attorney for the petitioner, having argued in support of the petition, and Julius L. Sackman, Principal Attorney, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent, having argued in opposition thereto, and due deliberation having been had thereon, it is hereby

ORDERED that the determination of the respondent be, and the same hereby is, confirmed, without costs.

The memorandum of decision, dated October 28, 1964, is referred to herewith:

Enter:

/s/ JOHN J. O'BRIEN,
Clerk.

Entered: November 2, 1964
A True Copy.
/s/ JOHN J. O'BRIEN
Clerk.

III

DECISION OF THE APPELLATE DIVISION

[SAME TITLE]

Per Curiam

This is proceeding pursuant to CPLR Article 78 transferred, after a hearing before the State Tax Commission, in accordance with CPLR #7804.

It was stipulated as follows: The petitioner, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959 and prior thereto he resided on the Onondaga Reservation. During the calendar year 1959 he was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York. During that year the Chrysler Corporation withheld from his wages New York State personal income tax in the amount of $126.37. The petitioner sought a refund. The State Tax Commission allowed a refund in the amount of $32.87 but denied a refund of the remainder amounting to $93.50, on the ground that the compensation paid to the taxpayer was income taxable under the New York State personal income tax law.

In State Tax Commission v. Barnes, 14 Misc. 2d 311, it was held, and we think correctly, that St. Regis Indians living on a reservation were subject to state income tax on income derived from wages. The petitioner here, regardless of his status as a tribal member, was under no statutory restriction as to employment and his earnings did not differ from those of any other resident of the State of New York.

Determination confirmed, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

IV

No. 513

No. 513.

In the Matter of the application of
IRVING W. POWLESS,

Appellant,

vs.

THE STATE TAX COMMISSION OF
THE STATE OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 28th day of December in the year of our Lord one thousand nine hundred and sixty-four, Irving W. Powless, the appellant—in this cause, came here unto the Court of Appeals, by Omar Z. Ghobashy, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State Tax Commission of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Omar Z. Ghobashy, of counsel

for the appellant—, and by Mr. Julius L. Sackman, of counsel for respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeals and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 21, 1965.

SEAL OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

No. 513

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of October in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS, The Hon. CHARLES S. DESMOND, Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur—October 21, 1965

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(2292)

IN THE

Supreme Court of the United States

No. 919—October Term, 1965

IRVING W. POWLESS,

Petitioner,

vs.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The New York State Tax Commission, the respondent herein, ruled that the petitioner, a member of the Onondaga Tribe of Indians, residing on the Onondaga Reservation in the State of New York, was subject to the New York State income tax on income earned by him as a mechanic employed by the Chrysler Corporation in Syracuse, New York (Appendix I to Petition, pp. 1a-3a).

The Appellate Division of the New York Supreme Court confirmed the determination of the respondent (Appendix II to Petition, pp. 4a-5a). Its opinion is reported in 22 A. D. 2d 746 (Appendix III to Petition, pp. 5a-6a). The Appellate Division approved the reasoning of the Court

in *State Tax Commission* v. *Barnes*, 14 Misc. 2d 311 (County Court, Franklin Co., 1958), and held that "Indians living on a reservation were subject to state income tax on income derived from wages. The petitioner here, regardless of his status as a tribal member, was under no statutory restriction as to employment and his earnings did not differ from those of any other resident of the State of New York."

The Court of Appeals affirmed, without opinion, the order of the Appellate Division (Appendix IV to Petition, pp. 7a-9a). The decision of the Court of Appeals is reported in 16 N. Y. 2d 946 (1965)

Jurisdiction

Jurisdiction is invoked by petitioner under 28 U. S. Code, § 1257(3).

Question Presented

Is an Indian who is a resident of an Indian Reservation in the State of New York subject to the payment of the New York State tax on personal income earned by him off the reservation as an employee of a private employer?

Statutes Involved[1]

FEDERAL

25 U. S. Code § 177
25 U. S. Code § 232
25 U. S. Code § 233

STATE

Tax Law, Art. 16, § 350
Tax Law, Art. 16, § 351

[1] See appendix hereto.

Statement

The respondent accepts the petitioner's statement of the facts.

Reasons for Denying Petition for Certiorari

This Court many years ago determined the question presented adversely to the Indians (*Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420, 421 [1936]). The petitioner is simply seeking to relitigate the question.

Summary of Argument

The argument of the petitioner boils down to this:

That Tax Law, Article 16, which deals with the tax upon personal income, cannot apply to him or to other Indians who reside on reservations because the State lacks power to impose the tax. Essentially, this purported lack of power is predicated upon the following alleged grounds:

(1) Complete lack of general or specific federal authority or approbation of such power or right;

(2) Immunity of reservation Indians to the tax by reason of certain treaties, statutes and decisional law.

It is the respondent's contention:

(1) That the petitioner, in particular, and all Indians in New York, generally, whether they reside on or off the reservations, do not enjoy an immunity to the State personal income tax, whether the alleged claim of immunity is based upon treaties, statutes or decisional law; and that, as a matter of fact, they have been statutorily subjected to the obligation to pay the tax (See Point I, *infra*);

(2) That federal authority or approbation of the State's sovereign power to impose the tax is not required (See Point II, *infra*);

(3) Assuming, *arguendo*, that federal authority or approbation is required to support the State's power to impose the tax, the fact of the matter is that such federal authority has been expressly statutorily granted (See Point III, *infra*).

ARGUMENT

POINT I

The New York Indians are subject to the State's personal income tax and cannot claim tax immunity.

A. No express statutory immunity has been conferred upon the Indians.

Article 16 of New York's Tax Law is inclusive in its language, imposing a "tax upon every resident of the state" (§ 351), which, by statutory definition, covers, among others, "any person domiciled in the state" (§ 350). The fact that the petitioner is an Indian does not give him any exemption from the State income tax. This was decided as to the Federal income tax in *Choteau* v. *Burnet*, 283 U. S. 691, 693-4 (1931)[2] and as to State income taxes in *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936).

---

[2] The federal statute in the cited case affected the income of "every individual" "from any source whatever." Choteau's income, like the petitioner's income, was unrestricted in character. This Court said (p. 694): "The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. *The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.*" (Emphasis added.)

The fact that the Indians reside on the reservation or elsewhere does not affect their liability to pay State income taxes so long as they are residents of New York (*The Cherokee Tobacco,* 11 Wall. 616, 619-620 [1870]; *Choteau* v. *Burnet, supra; Kake Village* v. *Egan,* 369 U. S. 60, 72 [1962]).

B. No tax immunity may be inferred.

Since neither the Tax Law nor any other statute expressly exempts the income of an Indian, and since the intent to exempt must be expressly stated, "it is not for this Court to make the exception" (*The Cherokee Tobacco, supra,* at page 620). The Tax Law is clear, explicit and unambiguous. "There being no room for ambiguity there is no room for construction. * * * The section must be held to mean what the language imports" (*The Cherokee Tobacco, supra,* at page 620. See also, *United States* v. *Stewart,* 311 U. S. 60, 71 [1940]).

The status of the Indian does not imply immunity (*Choteau* v. *Burnet, supra,* page 694; see also, *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U. S. 418, 420-1 [1934]; *Oklahoma Tax Comm.* v. *United States,* 319 U. S. 598, 606-8 [1942]; *Leahy* v. *State Treasurer of Oklahoma, supra*). In the last cited case this Court said (p. 421):

> "As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the state."

In the case at bar the State income tax was based on wages earned by the petitioner as a mechanic employed by the Chrysler Corporation. This was certainly unrestricted income. (See *Canary* v. *Oklahoma Tax Comm.,* 295 P. 2d 281 [Okl., 1956].)

POINT II

Federal authority or approbation of the State's sovereign power to impose the tax under Article 16 of the tax law is not required.

The possession by the national government of protective jurisdiction over Indians has not been determined to be an exclusive power nor has it been exercised in plenary fashion so as to leave no room for the States to assert their authority in furtherance of their own internal welfare as well as that of the Indians. Constitutionally there must be found a complete surrender of sovereignty to the Federal Government before the reserved powers of the State will give way (*United States* v. *Holliday*, 3 Wall. 407 [1865]; *United States* v. *McGowan*, 302 U. S. 535, 539 [1937]; *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556, 560, 562-4 [1961]).

The Indian Non-Intercourse Act (25 U. S. Code, § 177) which refers to treating with the Indians only with the approbation of a Federal Commissioner, upon which the petitioner herein heavily relies, refers, by its terms, only to transactions involving the alienation of Indian lands. It has no relevancy to the issue involved herein (*Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue, supra*, at page 421).

POINT III

Assuming, *arguendo*, that Federal authority or approbation is required to support the State's power to impose the tax, such authority has been expressly statutorily granted.

It has been the avowed policy of the Federal Government gradually to bring the Indian to an end of his old disabilities and dependency. To this end dealings by treaty were

abolished in 1871 (25 U. S. Code, § 71 and citizenship granted in 1924 (8 U. S. Code, § 1401). But Congress has gone much further with respect to the New York Indians. In 1948 the State of New York was statutorily *recognized* as having exclusive criminal jurisdiction over Indian offenses (25 U. S. Code, § 232; 62 Stat. 1224; July 2, 1948, c. 809), and in 1950 (effective September 13, 1952) Indians in New York were subjected to the civil laws of the State (25 U. S. Code, § 233; 64 Stat. 845; Sept. 13, 1950, c. 947).

It is obvious from the foregoing that the Indians in New York State have been subjected to the same civil obligations as apply to citizens generally and to the same civil jurisdiction of the State as is applicable to non-Indians. They were thereby given, as correlative rights, the same rights as are possessed generally by others.

It is submitted that, with the exceptions set forth in 25 U. S. Code, § 233, which are inapplicable to the case at bar, the New York Indians have been legally assimilated into the polity which is the "People of the State of New York."

Conclusion

The petitioner's contentions have so consistently and repeatedly been decided by this Court adversely to such contentions that it cannot be said that there exists here a substantial federal or constitutional question.

We respectfully request this Court to deny the Petition for Writ of Certiorari.

Dated: Albany, New York, January 31, 1966.

Respectfully submitted,

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APPENDIX

Federal Statutes

8 U. S. Code, § 1401.

"Nationals and citizens of United States at birth.

"(a) The following shall be nationals and citizens of the United States at birth:

* * *

"(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

* * *"

25 U. S. Code, § 71.

"Future treaties with Indian tribes.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

25 U. S. Code, § 177.

"Purchases or grants of lands from Indians.

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such

treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. (R. S. § 2116.)"

25 U. S. Code, § 232.

"Jurisdiction of New York State over offenses committed on reservations within State.

"The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, that nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights." (July 2, 1948, c. 809, 62 Stat. 1224.)

25 U. S. Code, § 233.

"Jurisdiction of New York State courts in civil actions.

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons

to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, that the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And Provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving

Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." (Sept. 13, 1950, c. 947, § 1; 64 Stat. 845.)

New York Statutes

Tax Law, Art. 16 Taxes Upon And With Respect to Personal Incomes.

"§ 350. Definitions.

"For the purpose of this article and unless otherwise required by the context:

* * *

"7. The word, 'resident' applies only to natural persons and includes any person domiciled in the state, * * *."

"§ 351. Imposition of income tax on net incomes and net capital gains.

"A tax is hereby imposed upon every resident of the state, * * *."

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Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

POINT I

General Rules on tax exemption are inapplicable.

This is not an ordinary case of income that is tax-exempted. The general doctrine against tax exemption is irrelevant in considering the taxing power of a state in relation to Indians. Dissenting Opinion of Mr. Justice Murphy in *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 612, 613 (1942), quoted with approval in *Big Eagle* v. *U. S.*, 300 F. 2d 765, 771, 772 (U. S. Court of Claims, 1962). In this latter case, the Court said at page 779:

> it is necessary to assess the weight to be given to two principles difficult to reconcile. The first of

> these, as laid down by the decisions, is that tax exemptions must be clearly expressed and cannot be granted by implication. The second principle is that statutes affecting Indians must be liberally construed, with all doubtful expressions being resolved in their favor.

Choate v. *Trapp*, 224 U. S. 665 (1912), *Sakezzie* v. *Utah State Indian Affairs Commissioner*, 215 F. S. 12, 17 (1963), *Ash Sheep Company* v. *U. S.*, 252 U. S. 159 (1920), *Kirkwood* v. *Arenas*, 243 F. 2d 863, 867 (1957) and *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1929).

U. S. v. *Stewart*, 311 U. S. 60 (1940) cited in Brief in Opposition at page 5 though ruled that exemption from taxation cannot rest upon mere implication, yet it cited Mr. Justice Cardozo in *Trotter* v. *Tennessee*, 290 U. S. 354, 356 (1933) in which he stated:

> Exemptions from taxation are not to be enlarged by implications if doubts are nicely balanced. * * * On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers.

POINT II

Cases not involving Reservations are distinguishable.

In his Brief, respondent relied on cases that dealt with territories outside the Reservations where is was said that state laws applied. *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556, 562 (1916) did not involve a Reservation but land ceded to Robert Morris by the Seneca Nation by the Treaty of "Big Tree" of September 15, 1797, 7 Stat. 601. This land admittedly was within the jurisdiction of the State of New York. This Court said at page 564:

> It should be added that we have not considered any question relating to conduct or fishing rights

upon territory, not ceded, which is comprised within the Indian Reservation.

U. S. v. *Holliday,* 70 U. S. (3 Wall.) 407, 411 (1865) dealt with a sale of liquor not on an Indian Reservation or on Indian country but in an organized county of the State of Michigan. This Court held that the subject of the regulation of use and sale of liquors, within the State and away from Indian Reservations, is a matter for the State, in the exercise of its police powers.

U. S. v. *McGowan,* 302 U. S. 535 (1937) was concerned with Reno Indian Colony, an area that was undisputable Nevada and which was recognized as such by the Federal Government.

Kake Village v. *Egan,* 369 U. S. 60, 62 (1961) did not involve a reservation. This case is to be read with the companion case of *Metlakatla Indian Community* v. *Egan,* 369 U. S. 45 (1961). Furthermore, it is to be noted that Mr. Justice Frankfurter, in these two cases, has clearly indicated that Indians of Southeastern Alaska, are distinguishable from Indian Tribes in the United States by reason that they were not aboriginal natives of Alaska but migrated from Canada, they never had a treaty with the United States and were never in the hostile and isolated position of many tribes in other States.

In contrast, this Court in *Foster* v. *Pryor,* 189 U. S. 325, 329-331 (1903) held that a Reservation was not part of the State of Oklahoma.

POINT III

Revenue Statutes not based on residence distinguished.

There is a distinction between Tax Statutes that impose the tax on "every individual" and on income "from any source whatever" as in *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U. S. 418 (1938), and exclusive reliance on residence as the basis for imposing the tax as in the case at bar. (Respondent's Brief, Page A4)

Leahy v. *State Treasurer of Oklahoma,* 297 U. S. 420 (1936) cited by respondent at page 3 as the reason for denying the Petition is distinguished from the present case in that it was decided on the authority of *Choteau* v. *Burnet,* 28 3 U. S. 691 (1931), and the facts were substantially the same as those presented by Choteau. Moreover, the case involved, as in the Choteau case, *a competent* member of Osage Tribe who has received certificate of competency. In the Supreme Court of Oklahoma, 49 P. 2d 570 (1935), the State of Oklahoma rested its case on the issuance of the certificate of competency and the removal of tribal relations and other restrictions.

In the Leahy case, supra, the Oklahoma Statute involved, Income Tax Act of 1931, *Oklahoma Statutes Annotated,* Title 68 (Appendix, p. 477), Article 4, levied a tax "upon the entire income of every person residing or domiciled within the State derived from all property owned and from every business, trade, profession or occupation * * * and upon the net income of every person residing or domiciled elsewhere derived from property owned and business done within the state." The question

of residence was not invoked for it was immaterial. In the case at bar, Respondent is arguing that peitioner is a resident of the State of New York, and the imposition of the tax is rested on this residence alone.

The Indian involved in *Canary* v. *Oklahoma Tax Commission,* 295 P. 2d 281 (1956) was not a restricted Indian.

POINT IV

Congress alone has the power to determine the termination of national guardianship over Indians.

This rule has been consistently advocated by this Court. *U. S.* v. *Waller,* 243 U. S. 452, 459 (1916) and cases cited there clearly established that only Congress has the power to determine when and how the national guardianship over Indians shall be terminated. In the case last cited, this Court also held that it rests with Congress to determine the time and extent of emancipation of Indians.

In *U. S.* v. *Holliday,* 3 Wall. 407, 419, this Court held:

> No State can, either by its Constitution or other legislation, withdraw the Indians within its limits from the operation of the law of Congress regulating trade with them, notwithstanding any rights it may confer on them as electors or citizens.

It is, therefore, totally inconsistent with the decisions of this Court the contention of respondent at page 7 of his Brief in Opposition that "the New York Indians have been legally assimilated into the polity which is the 'People of the State of New York'". This situation was explained in *State* v. *Columbia George,* 39 Oregon 127, 65 P. 604, 610 (1901) as follows:

> • • • citizenship • • •, is neither inconsistent nor incompatible with the status of a tribal Indian;

> that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes. * * * The condition may appear to be an anomalous one that a person may be admitted to citizenship under one government and yet be permitted to maintain allegiance to another, however primitive that other may be. But such seems to be the natural outgrowth of the anomalous attitude that the general government has maintained towards the Indian from the beginning.

Conclusion

This Court though has not decided the specific question presented in this case, has upheld petitioner's contentions. Cases cited by respondent are clearly distinguished from the case at bar.

We respectfully request this Court to grant the Petition for Writ of Certiorari.

Dated: New York, New York,
February 10, 1966.

Respectfully submitted,

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